IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICGTION

SUIT NO. 2103 OF 1984

Mars Construction and Trading
Co. (Pvt.) Ltd. ... Plaintiffs

vs.

City and Industrial Development
Corporation of Maharashtra Ltd. ... Defendants

Mr. Sandeep Parikh
i/b. S.G. Lakhani for plaintiff

Mr. H. L. Modi i/b.
Little &Co., for defendant

CORAM: **A. S. AGUIAR J.**

Date: 13/9/ 2004

ORAL JUDGMENT:

1. This suit is filed by the plaintiffs claiming a sum of Rs.8,18,756.92 as per particulars of claim set out in exhibit "W", as well as further interest from the date of filing of the suit till judgment. The plaintiffs claim the aforesaid amount, as and by way of refund, of an amount including a sum of Rs.5,44,967/- paid by them as interest under

protest, as per the demand of the defendants, on account of alleged delay in making payment of the installments towards purchase of the two plots totally admeasuring 10,000 sq. fts., situated at District Business Center, Vashi, New Bombay.

2. Briefly stated the case of the plaintiffs is that in or about May / June 1980 the defendants - CIDCO invited applications for commercial plots in the said District Business Centre at Vashi pursuant to which the plaintiffs applied for and was allotted two plots bearing nos. 80 and 81 admeasuring 6000 sq. meters and 4000 sq. mts., respectively at the rate of Rs.510/- per sq. meters on the terms and conditions set out in the letter dated 11th June 1980 bearing No. MM/BBC/Vashi /P34. The said two plots were to be leased for a period of 60 years from the date of the execution of the agreement for a total premium of Rs.51 lakhs, 50% of which was payable within a month from the date of issue of the letter and balance to be paid within a month thereafter. The plaintiffs paid the initial

amount of Rs.5 lakhs by pay order dated 6th July 1980 which was recorded by letter dated 18th July 1980. In the said letter the plaintiffs referred to some ambiguity in the offer and requested the defendants to send the dimension of the plots as well as finalise the areas of the plot. However, the defendants by their letter dated 11th September 1980 called upon the plaintiffs to pay the total lease premium of rs.51 lakhs within 15 days failing which it would be presumed that the plaintiffs were not interested in the plot and that the defendants would cancel the said allotment. It appears that thereafter there was some correspondence exchanged between the parties in respect of the terms of allotment of plots. The plaintiffs by their letter dated 18th November 1980 paid a further amount of Rs.5 lakhs to the defendants. Correspondence between the parties continued and on 10th March 1981 at a meeting between the parties several issues were discussed and the terms of the lease were more or less finalised. Thereafter, the plaintiffs made subsequent payments which are set out in their letter dated 16th July 1981 stating that they have

paid the aggregate amount of rS.84,240/-, being the full amount payable by the plaintiffs to the defendants in respect of the suit plot. However, despite that the defendants failed to hand over the plot and started insisting that the plaintiffs should pay interest on the delayed payments and by letter dated 20th July 1981 the defendants informed the plaintiffs that the interest claimed by them in respect of the delayed payments worked out to Rs.5,44,967/- and called upon the plaintiffs to pay the said amount as well as documentation charges of Rs.120/- so that possession of the plot could be handed over to the plaintiffs. The plaintiffs by their letter dated 29th July 1981 made a grievance about the change of user etc., and questioned the demand for payment of interest. However, ultimately, the plaintiffs by their letter dated 29th July 1981 paid the said amount of Rs.5,44,967/- specifying that the same was being paid under protest. The defendants accepted the said amount and handed over possession of the plot to the plaintiffs. Thereafter two lease agreements dated 31st July 1981 were executed by the

defendants in favour of the plaintiffs. By letter dated 15th September 1981 the plaintiffs called upon the defendants to return the interest paid under protest by their letter dated 21st July 1981 and the defendants by their reply dated 16/19th September 1981 informed that the matter has been considered by the management and it was decided that the amount of interest paid under protest cannot be refunded.

3. Thereafter there was some further correspondence pertaining to the deviations in the terms of the agreement of lease and ultimately the plaintiffs by their advocate' s letter dated 22nd June 1982 called upon the defendants to withdraw their letter dated 13th April 1981 and to refund the interest amount and to permit the plaintiffs to use the ground and 1st floor for commercial / residential purposes. By the said letter dated 13/4/1981 the defendants, had conceded to the demands of the plaintiffs for increasing the height of the building and for using the land for shops and commercial purposes and the upper floors for residential purposes. By the said letter of 13th April 1981 the

defendants had called upon the plaintiffs to make payment of the lease premium together with interest thereon. Though reference is made by the plaintiff in the letter dated 22/6/82 to the variations in the terms of the lease the demand is confined to the refund of the interest amount which the plaintiffs claim to have paid under protest without payment of which possession of the plot would not have been handed over to the plaintiffs.

4. The defendants have filed their statement raising several contentions viz., that the plaint does not disclose any cause of action, that the suit is barred by law of limitation and that the notice contemplated under para 9 of the schedule to the Maharashtra Regional and Town Planning Act, 1966, has not been given and thus the mandatory provision of the said Act has not been complied with. On merits, it is contended that the plaintiffs have failed to make payment of the premiums as per the schedule set out in the letter of offer dated 11th June 1980 (exhibit 'A') to the plaint. According to the defendants 50% of the lease premium

was payable within a month from the date of issue of the letter dated 11th June 1980 and the balance was payable within a month thereafter. It is pointed out that the plaintiffs by their letter dated 18.7.1980 accepted the offer and the terms and conditions thereof but made a down payment of Rs.5 lakhs only although they were required to pay 50% i.e. Rs.25 lakhs approximately. It is therefore contended by the defendants that the plaintiffs have contravened the provisions of lease by not making payment and therefore they are liable to pay interest at the rate of 15% for the delayed payment.

5. It is further contended that the plaintiffs have raised irrelevant, frivolous and false contentions which have nothing to do with the payment of the lease premium. It is pointed out that the plaintiffs have accepted the allotment which is subject to the provisions of the New Bombay Disposal of Lands Regulations, 1975 and that regulation No.5 provides for payment of interest at the rate of 15% per annum in case of delayed payments and therefore the

defendants were justified and empowered in charging the interest from the plaintiffs, for the delayed payments.

6. The defendants contend that the plaintiffs were not ready and willing to make payment of the full amount and there has been deliberate default on their part in making payment of the premium, within the stipulated time. It is further contended that on account of the delayed payments of the lease premium the plaintiffs have incurred liability to pay interest as required under the said regulation and therefore there is no question of refund of the interest paid, albeit under protest. It is pointed out by the defendants that although the defendants by their letter dated 13th April 1981 called upon the plaintiffs to make payment of the lease premium with interest the plaintiffs failed to make payment of the entire amount nor did the plaintiffs raise any dispute about the payment of interest which the defendants had claimed as far back as 1st October 1980. The defendants have denied the plaintiffs contention that the contract was finalised between the parties only after the

plaintiffs received letter dated 13th April 1981 whereby the defendants conceded to the claim of the plaintiffs. It is the case of the defendants that the contract was concluded upon acceptance of letter dated 18th July 1980 and it was only in view thereof that the defendants had accepted the initial payment made by the plaintiffs.

7. Although the plaintiffs had made payment of diverse amounts towards the premium aggregating to Rs.48,06,240/- this, according to the defendants, did not constitute payment of the full premium and admittedly there was a delay on the pat of the plaintiffs in making payments which ought to have been finally made on or before 10th August 1980. It is the case of the defendants that in view of the delay in making the payments on time the defendants are entitled to charge interest on account of delay in payment of lease premium and further that the defendants were also entitled to with hold handing over possession of plots to the plaintiffs till the full premium amount was paid. It is the contention of the defendants

that the payment of lease premium was unconnected with the disputes and differences raised by the plaintiffs and the said disputes were merely a ruse for non payment of lease premium on the due dates. It is pointed out that the lease premium was to be fully and finally paid on or before 10th August 1980 until which date no disputes were raised and / or differences of opinion emerged and / or clarification sought by the plaintiffs.

8. On the basis of the pleadings the following issues were framed:

1) Whether the suit is liable to be dismissed as is barred by the law of limitations?

2) Whether th defendants complied with the provisions of the Maharashtra Regional and Town Planning Act, 1966 ?

3) Whether the plaintiffs prove that they are entitled to recover from the defendants a sum of Rs.8,18,756.92 with interest as claimed in the suit?

4) Whether the plaintiffs prove that the payment of the total lease premium was wrongfully asked for and/ or

the interest at the rate of 15% was wrongfully asked for?

5) Whether the defendants prove that they were entitled to recover interest amount of Rs.5,44,947/- from the plaintiffs and also documentation charges?

6) What order and decree?

9. Both learned advocates confirm that issue no.2 has been re-framed by the court before commencement of the trial as follows :

"Whether notice was issued as per para 9(a) of schedule 1 of the Maharashtra Regional and Town Planning Act, 1966 ?"

10. The first issue would be a preliminary issue. Learned advocate for the defendants Mr. Modi at the stage of argument on the point of limitation has sought to raise another issue on limitation under clause 9(b) of the Schedule 1 to the Maharashtra Regional and Town Planning Act, 1966 which requires the suit to be filed within 6 months from the accrual of cause of action. He has submitted that this issue may be framed in the event

of this court coming to the conclusion that issue no.1 does not cover the issue of limitation under para 9(b) of schedule 1.

11. Learned advocate for plaintiffs Mr. Parikh points out that the suit is not barred by law of limitation and in fact has been filed within the period of limitation. It is pointed out that the period of limitation for filing the suit started running from 16th / 19th October 1981 being letter of the said date addressed by the defendants to the plaintiffs informing the plaintiffs that the interest amount of Rs.5,44,947/- , paid under protest could not be refunded. The suit is filed on 18th July 1984, i.e., within the period of 3 years and therefore the suit cannot be said to be barred by law of limitation. However, learned advocate Mr. Modi for the defendants contends out that the suit will be barred as being filed beyond the period of limitation as set out in clause 9(b) of schedule 1 of the Maharashtra Regional and Town Planning Act, 1966, which requires the suit to be filed within 6 months from the accrual of cause of action. In this case admittedly the cause of action arose on 16/19

October 1981 and the suit has been filed on 18th July 1984 almost three years after the said date and therefore the said suit is barred under the provisions of Maharashtra Regional and Town Planning Act, 1966 itself. On this question there has been much debate.

12. Learned advocate Mr. Modi had prayed that such an issue, though not specifically raised in the pleadings has to be framed by the Court. The issue, being an issue of law, has to be decided by the court and it is well within the power of the court to frame the issue as and when required. However, learned advocate Mr. Parikh points out that no averments have been made in the written statement raising the defence of limitation under the Maharashtra Regional and Town Planning Act, 1966 and therefore no such issue can be raised at this stage. Reliance is placed on Order VIII Rule 2 as well as Rule 14, sub rule 1 of Order VIII. Rule 2 requires the defendants to raise in the pleadings all matters which would show that the suit not maintainable and that the transaction is either void

or voidable in point of law and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. Under Order 14 Rule 1, when a material proposition of fact or law is affirmed by one party and denied by the other the court is required to frame issues of facts or law that necessarily and properly arise for determining the real controversy. In the present case the defendants have not specifically raised the defence under the Maharashtra Regional and Town Planning Act, 1966 . No reference is made to clause 9 of the Maharashtra Regional and Town Planning Act, 1966 and to the requirement of notice to be given under clause 9(a). No specific defence under clause 9(b) has been raised. Every issue in law must be specifically raised in the defence in the absence of which the court is helpless and cannot frame any such issue much less, can such an issue be raised after the evidence has been recorded and the trial concluded. When the court re-framed issue no. 2 it was with reference to the compliance of the provisions of Maharashtra Regional and Town Planning Act, 1966 and

with specific reference to the notice to be given under clause 9(a). Even at that stage the defendants did not seek to raise the question of limitation under clause 9(b) of the MRTP Act. In the circumstances the request of learned counsel for the defendants for framing an issue of limitation under clause 9(b) cannot be acceded to and is accordingly rejected. The suit cannot be said to be barred under the provisions of Maharashtra Regional and Town Planning Act, 1966.

13. So far as the general law of limitation is concerned a period of 3 yeas is prescribed within which the plaintiffs can file the suit. In the present case the plaintiffs have filed the suit within 3 years from the date the cause of action arose, that is letter dated 16/19th October 1981 informing the plaintiff that the interest amount of Rs.5,44,947/- could not be refunded. Hence the suit is well within time and cannot be said to be barred by the law of limitation. Issue no.1 must therefore be answered in the negative.

14. So far as issue no.2 is concerned defendants have contended that no notice under clause 9(a) of the Maharashtra Regional and Town Planning Act, 1966 has been given. However, learned advocate for the plaintiffs points out that the provisions of clause 9(a) have been complied with by sending notice dated 11th April 1984, exhibit 'V' which was prior to the filing of the suit and the suit has been filed after expiry of 2 months from the date of the said notice, giving all the particulars required to be given, setting out the cause of action, name, place and address of the advocates and the reliefs sought. The notice has specifically complied with the requirements of clause 9(a). It may further be noted that the letter dated 11th April 1984 has referred to the earlier correspondence which sets out all necessary details. It thus cannot be said that the provisions of clause 9(a) has not been complied with. Thus issue no.2 is required to be answered in the affirmative.

15. Issue nos. 3, 4 and 5 are cumulatively dealt with as

follows:

It must straight away be pointed out that issue no.4 is not necessary as the subject matter of the suit is the refund of the interest which the plaintiffs claim to have been paid under protest. The amount of lease premium is irrelevant for considering the question whether the defendants were entitled to claim interest or not. The plaintiffs at no point of time raised the question that the premium charged was exorbitant or improper. The question therefore of answering issue no.4 in so far as it requires the plaintiffs to prove that the payment of total lease premium was wrongfully asked for, does not arise.

16. On the question whether the plaintiffs are entitled to receive Rs.8,87,757.92 by way of repayment of the amount paid under protest, it must be clarified that the principal claim by way of refund is Rs.5,44,967/- and the balance is by way of interest at the rate of 18% per annum. The defendants had levied interest on delayed payments of premium at the rate of 15% under the New Bombay

Disposal of Lands Regulations, 1975. Regulation 5 provides for payment of interest at the rate of 15% per annum in the case of delayed payment of interest or premium. Admittedly the transaction is covered under the New Bombay Disposal of Lands Regulations, 1975 and the defendants were therefore entitled to claim interest on delayed payments of premium under the said regulation. Learned advocate for the defendants states that the defendants had claimed interest at the rate of 15% by their letter dated 1st October 1980. However, Regulation 5 under Chapter IV entitles the authorities to charge from on the intending lessee at the rate to be approved by the Corporation by a General or Specific order. No such General or Specific order has been produced before the court. It is submitted by the learned advocate for the defendants that the interest at the rate of 15% has been charged on the basis of rate of interest prevailing at that time. The rate of 15% has been fixed by the defendants and intimated to the plaintiffs by exhibit 'D' letter dated 1st October 1980, calling upon the plaintiffs to pay the total

lease premium immediately with interest at the rate of 15% failing which it was stated that the allotment will be canceled. It is pertinent to note that at no stage the plaintiffs questioned the rate of interest demanded by the defendants on the delayed payment of premium. It is also pertinent to note that the plaintiff himself in the present suit has demanded interest at the rate of 18%. Merely because the defendants have failed to show that they are entitled to charge interest on the basis of Regulation 5 of the New Bombay Disposal of Lands Regulations, 1975 and to show any special or general order empowering the defendants to charge interest at that rate, it cannot be said that the plaintiffs have proved that the rate of interest of 15% has been wrongfully asked for by the defendants. The burden was upon the plaintiffs to prove that the defendants were not entitled to claim interest at 15% per annum for the delayed payment of premium. The plaintiffs could have done so by adducing evidence to show that they disputed the rate of interest charged by the defendants. The plaintiffs failed to reply to the defendants'

notice demanding interest at the said rate. The plaintiffs are therefore deemed to have accepted the rate of 15% as the rate chargeable on delayed payment of interest. Hence issue no. 4 has to be answered in the negative.

17. So far as issue nos. 3 and 5 are concerned the controversy revolves on the question whether the defendants were entitled to charge interest until payment was made. It has been the endeavor of the plaintiffs to show that the defendants were not entitled to charge any interest on the delayed payments because in fact there was no delay in the payments. This is sought to be substantiated by referring to several aspects of the lease transaction which had not been complied with by the defendants. From the correspondence exchanged between the parties it appears that there was some dispute about difference in the area of the land to be leased out while the offer letter dated 11th June 1980 refers to 10,000 sq. meters of land, it ultimately transpired that the plaintiffs were to be given possession of only 9424 sq.

meters. Further the use of the land was for construction of ground floor for shops and commercial units while the upper floors were to be used for residential purposes. Further, according to the plaintiffs the height restrictions imposed made it impossible for the plaintiffs to utilise the entire FSI of the plot which was fixed at 2. These controversies were raised by the plaintiffs in their correspondence with the defendants and in view thereof the plaintiffs justified non-payment of the premium as envisaged by letter dated 11th June 1980, which required the plaintiffs / lessees to pay a total premium of Rs.51 lakhs, as per the schedule viz., 50% within a month from the date of the said offer letter and the balance 50% within a month thereafter.

18. The entire payment of premium was required to be made by 11th August 1980. The plaintiffs committed default in making payment of the first installment of 50% and instead of paying the first installment of Rs.25,000/- the plaintiffs made a down payment of only Rs.5 lakhs on 18th July 1980. The next five lakhs were paid on 18th

November 1981. Further amounts were paid from time to time, making a total payment of Rs.486240/-. Although the total amount payable under the offer letter dated 11th July 1980 was Rs.51 lakhs, the plaintiffs only paid Rs.4,86,240 in view of the reduced area which was accepted by the defendants.

19. The offer letter dated 11th June 1980 was accepted by the plaintiffs letter dated 18th June 1980 by making a down payment of Rs.5 lakhs. The letter dated 18th July 1980 states as follows: "... We refer to your above mentioned letter dated 11/6/1980 and the subsequent discussions held with you regarding the allotment of the above mentioned plot. We are now enclosing herewith a paying slip for Rs.5,00,001/- (Rupees five lakhs and one only) being our 1st payment towards the allotment of the commercial plot...." Thereafter the defendants sent a letter dated 11th September 1980 to the plaintiffs informing them that the total lease premium payable by by the plaintiffs was Rs.51,00,000/- out of which the plaintiffs were required

to pay 50% i.e, Rs.25,50,000/- within one month from the date of issue of allotment order and the balance amount one month thereafter. That more than one month has elapsed and the plaintiffs had paid only Rs.5 lakhs as against Rs.51 lakhs. The defendants called upon the plaintiffs to pay the total lease premium within 15 days from the receipt of the said letter. Thereafter by letter dated 1st October 1980 described as corrigendum the defendants informed the plaintiffs of the reduced area from 10,000 sq. mts., to 9,424 sq. mts. And also referred to the revised payments to be made which was orally communicated by the defendants to the plaintiffs. By the said letter dated 1st October 1980 the defendants called upon plaintiffs to pay the lease premium immediately with interest at the rate of 15%. The plaintiffs at no stage questioned the right of the defendants to charge interest but continued to raise objections by subsequent letters calling upon the defendants to clarify certain matters pertaining to the leased plot. In fact by letter dated 17th July 1981 (Exhibit 'N') the plaintiffs enquired with the defendants as to the

amount of interest required to be paid so that they could pay the same and get possession of the plots. Thereafter the defendants by their letter dated 28th July 1981 told the plaintiffs that the interest on delayed payment of the premium worked out to Rs.5,44,947 /- and called upon the plaintiffs to pay the said amount along with documentation charges of Rs.120/- so that possession of the land could be handed over to the plaintiffs. After receipt of the said letter the plaintiffs by their letter dated 29th July 1981 informed the defendants that they were not legally entitled to charge any interest. By the said letter they also requested that they should be given possession of the land and forwarded two demand drafts one for Rs.4 lakhs and another for Rs.1,44,967/- and also a draft of Rs.120/- being the documentation charges and requested the defendants to hand over possession of the land. The said letter made it clear that the amount of interest was paid under protest. Thereafter again by letter dated 15.9.81 the plaintiffs informed the defendants that they had made the payment of Rs.1,44,967/- under protest and requested for

refund of the said amount. The defendants by their letter dated 16/19 October 1981 (Exhibit ' S')informed the plaintiffs that the said amount could not be refunded. Thus it is seen that the plaintiffs did not dispute the right of the defendants to recover interest for the delayed payment and in fact handed over two demand drafts totaling to Rs.5,44,967/- towards interest on delayed payments. It was only at this stage that the plaintiffs questioned the right of the defendants to charge interest but paid the same under protest clearly with a view to get possession of the plots and thereafter made a demand for refund of the interest paid under protest which is the subject matter of the suit.

20. The defendants claimed the right to recover interest on delayed payment under clause 5 of the New Bombay Disposal of Lands Regulations, 1975 which reads as follows:

"5. *Payment of premium*

(1) The premium agreed to be paid by

the Intending Lessee shall be paid in two equal installments: the first installment shall be paid within the month from the receipt of acceptance by the Corporation of his proposal and the second installment shall be paid within two months from such receipt of acceptance.

(2) The Managing Director may in a deserving case, extend either of the forgoing periods on the payment of interest by the Intending Lessee at the rate to be approved by the Corporation by a general or specific order:"

21. From the said Regulation 5 it is seen that the premium is required to be paid in two equal installments; the first installment to be paid within a month from receipt of acceptance by the Corporation and the second installment to be paid within 2 months from the date of acceptance. Further the Managing Director of the Corporation was entitled in deserving cases to extend the period of payment for making the aforesaid payment of installments

on the payment of interest by the lessee at the rate to be approved by general or specific order. Thus though the plaintiffs were required to pay the two installments totaling Rs.50 lakhs within a period of 2 months. the plaintiffs failed to do so. The Corporation was therefore entitled to cancel the allotment and forfeit the amount paid which the Corporation did not do, but instead, in exercise of its discretion, accepted further amounts by way of delayed payments and therefore became entitled to charge interest on the said delayed payments. Admittedly the allotment was covered under the New Bombay Disposal of Lands Regulations, 1975 and therefore the Corporation is entitled to exercise its discretion to exercise its powers under Rule 5 for recovery of the premium and payment of interest in respect of the delayed payments.

22. The plaintiffs have sought to raise several objections to justify not making payments as per schedule. These disputes are not material to the central question of payment of interest on delayed payment of premium. Admittedly there is a delay in payment of the premium installments

and therefore the defendant Corporation is entitled to charge interest in respect thereof. The objections raised by the plaintiffs' letter is in fact met by the Corporation and defendant Corporation has in view thereof reduced the total premium payable in view of the reduction in the area of the land. The Corporation also conceded to the plaintiffs demands for being allowed to utilize the flats for commercial as well as residential purposes. The restrictions on height of the building was also waived. Thus there was no cause for the plaintiffs to have failed to pay the premium installments in time.

23. The objections raised by the plaintiffs appear to be a mere ruse to avoid making payment of the premium installments. In fact by their letter dated 2nd February 1981 the plaintiffs proposed to the defendant Corporation that the cost of land be reduced from Rs.500/- per sq. meter to Rs.255/- in view of the plaintiffs not being able to utilize the entire FSI. Needless to say that this proposal was not accepted. But this clearly shows that there was a deliberate attempt on the part of the plaintiffs not to pay the

premium, as per the schedule set out in the letter of offer dated 11th June 1980.

24. In the circumstances the defendants have proved that they are entitled to recover interest on the sum of Rs.5,44,947/- from the plaintiffs as well as documentation charges. Hence issue no.5 is answered in the affirmative. The plaintiffs have failed to prove that they are entitled to recover from the defendants a sum of Rs.8,87,757.92 with interest as claimed in the suit. Hence issue no.3 is required to be answered in the negative. Thus the suit of the plaintiffs fails and is accordingly dismissed with no order as to costs.

(A. S. AGUIAR J.)